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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Carroll County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-44
)	
DAVID W. KLEIN,)	Honorable
)	Val Gunnarsson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Defendant forfeited his sentencing issue by failing to move to reconsider his sentence, and he forfeited plain-error review by failing to argue the applicability of either of the plain-error prongs; in any event, the trial court did not err in sentencing him to seven years' imprisonment for second-degree murder, as the court did consider the various mitigating factors, which we were not permitted to reweigh.

¶ 1 Following a bench trial, defendant, David W. Klein, was convicted of second-degree murder (720 ILCS 5/9-2(a)(1) (West 2008)) and was sentenced to seven years' imprisonment. Defendant appeals, contending that the trial court abused its discretion in imposing the sentence. For the reasons that follow, we affirm.

¶ 2

BACKGROUND

¶ 3 The evidence presented at trial tended to prove the following. On September 9, 2009, defendant and the victim, Jacob Morhardt, got into a verbal altercation. During this argument, Amanda Morse observed Morhardt holding a knife. Morhardt told defendant that he (Morhardt) had a knife and was not afraid to use it. Morhardt ran into the apartment building hallway with defendant chasing him. Defendant tackled Morhardt and the two began to engage in a physical altercation. Dustin Pogue and Bobby Rogers joined the two in the hallway and attempted to break up the altercation by helping Morhardt. Pogue hit defendant three or four times, knocked him down, and attempted to pull him away from Morhardt. Rogers knocked defendant over. During the altercation, defendant and Morhardt were separated on several occasions, giving defendant the opportunity to extract himself. Defendant did not do so, however. At some point during the altercation, Morhardt and defendant wound up on the floor again. Morhardt was seated with his back against an air conditioner that was lying in the hallway. Defendant was also seated on the floor, with his back against Morhardt's chest. Pogue and Rogers then observed that defendant had a knife in his hand. Both tried to get the knife away from defendant—Rogers by kicking defendant—but were unsuccessful. Morhardt had defendant in a headlock and was choking defendant. Defendant was reaching behind him to stab Morhardt with the knife, once reaching straight back over his shoulder and stabbing Morhardt in his chest. Morhardt then released defendant and screamed that he had been stabbed and could not breathe. Blood was spurting from Morhardt's chest. Defendant then fled the scene. Morhardt later died from a stab wound to his chest that severed his subclavian artery.

¶ 4 At the sentencing hearing, multiple witnesses testified. Two probation officers who had worked with defendant while he was on probation for a juvenile offense testified that defendant had

trouble complying with the requirements of his probation and that several petitions to revoke his probation were filed. Ultimately, defendant's probation was terminated unsuccessfully. Two people from defendant's church, including the pastor, and one person whom defendant worked with testified that defendant was a polite and respectful person and involved in church activities. Defendant's parents also testified, stating that their son was involved with Scouts, mission work, and the church. Following arguments by the parties, the trial court sentenced defendant to seven years' imprisonment.

¶ 5 Defendant then brought this timely appeal.

¶ 6 ANALYSIS

¶ 7 On appeal, defendant contends that the trial court abused its discretion in imposing the sentence because it failed to consider in mitigation that defendant had been provoked and that defendant had significant rehabilitative potential. Because defendant has forfeited review of this issue, we affirm.

¶ 8 It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Bannister*, 232 Ill. 2d 52, 76 (2008); see also 730 ILCS 5/5-8-1(c) (West 2008) ("[a] defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence"). Defendant concedes that he did not file a motion to reconsider the sentence and, thus, forfeited his claims.

¶ 9 Nevertheless, defendant urges us to review the issue under the plain-error rule. Plain error is a limited and narrow exception to the general forfeiture rule. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain relief under the plain-error rule, a defendant must show that a clear or obvious

error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If the error complained of is not a clear or obvious error, a reviewing court need not go any further, because, without a clear or obvious error, the defendant cannot invoke the plain-error rule. See *People v. Moreira*, 378 Ill. App. 3d 120, 131 (2007). On the other hand, if a clear or obvious error is identified, a defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. *Moreira*, 378 Ill. App. 3d at 131. That is, “[i]n the sentencing context, a defendant must *** show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing.” *Hillier*, 237 Ill. 2d at 545; see also *People v. Hall*, 195 Ill. 2d 1, 18 (2000).

¶ 10 Defendant fails to meet the standards for plain error in two ways. First, defendant fails to make any argument on appeal as to how the evidence at the sentencing hearing was closely balanced or how the error was so egregious as to deny him a fair sentencing hearing. Accordingly, defendant has forfeited his plain-error argument. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (where the defendant failed to argue that the alleged error fell under either of the plain-error prongs, he forfeited his plain-error argument).

¶ 11 In addition, however, defendant also fails to establish that the trial court erred in sentencing him to seven years’ imprisonment. In imposing a sentence, the trial court is charged with the duty of balancing relevant factors and making a reasoned decision as to the appropriate punishment. *People v. Latona*, 184 Ill. 2d 260, 272 (1998). It is not this court’s function to reweigh the relevant sentencing factors or substitute our judgment for that of the trial court. *People v. Woodard*, 367 Ill. App. 3d 304, 321 (2006). When a sentence falls within the statutory limits for the offense, the sentence will not be disturbed absent an abuse of discretion by the trial court. See *People v.*

Coleman, 166 Ill. 2d 247, 258 (1995). A trial court abuses its sentencing discretion when the penalty imposed “is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 12 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant’s rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Kolzow*, 301 Ill. App. 3d at 8. “The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors.” *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A sentencing judge is presumed to have considered all relevant factors unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001).

¶ 13 Defendant contends that the trial court failed to take into consideration that he acted while under strong provocation and that his age, criminal history, and social activities demonstrate significant rehabilitative potential. In support of his contention that the trial court did not consider that he was provoked at the time of the offense, defendant relies on this statement by the trial court: “The factors in mitigation under [the governing statute (730 ILCS 5/5-5-3.1 (West 2008))], other than what is inherent in the offense of Second Degree Murder with respect to the belief that when justified is self-defense, I don’t see any factor in mitigation.” This statement does not demonstrate that the trial court failed to consider the provocation of defendant as required by the statute (730 ILCS 5/5-5-3.1(a)(3) (West 2008)), but instead demonstrates that the trial court awarded no weight to that factor. In fact, the trial court specifically stated that it was very familiar with the

circumstances of the offense and had taken into consideration the nature and circumstances of the offense.

¶ 14 Defendant's contention that the trial court failed to consider defendant's age, minimal criminal history, and social involvement is equally without merit. The trial court commented on the witness testimony in favor of defendant and on his social activities. The trial court also paid special attention to defendant's criminal history, including the fact that, while on probation for felony theft, five separate petitions to revoke defendant's probation were filed. These petitions were filed because defendant repeatedly failed drug tests, failed to complete community service, failed to report to jail on time, and was arrested for driving under the influence of drugs. Defendant's probation was repeatedly modified and ultimately terminated unsuccessfully. The trial court also commented on defendant's numerous refusals to attempt or complete treatment programs for his drug use. Based on this, the trial court concluded that its sentence of seven years' imprisonment was necessary to rehabilitate defendant.

¶ 15 Given that the trial court stated that it had considered the nature and circumstances of the offense, commented on defendant's social involvement, and thoroughly discussed his criminal history, we disagree with defendant that the trial court failed to consider that defendant was provoked and his rehabilitative potential. Rather, defendant is simply requesting that we afford more weight to those factors than the trial court did. As a court of review, we are not permitted to reweigh these factors or substitute our judgment for that of the trial court. *Woodard*, 367 Ill. App. 3d at 321.

¶ 16 CONCLUSION

¶ 17 For the reasons stated, the judgment of the circuit court of Carroll County is affirmed.

¶ 18 Affirmed.

